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United States Court of Appeals For The Fifth Circuit

No. 16,320

JOSEPH TOMLEY,
Appellant

v.

UNITED STATES OF AMERICA
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION FOR REHEARING

WALLACE MILLER, JR.,
Attorney for Appellant

U. S. COURT OF APPEALS
FILED
JAN 15 1958
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In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 16,320

JOSEPH TOMLEY,
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Comes now Joseph Tomley, appellant in the above-styled case, within the time fixed by the rules of this Court, and files this his motion for a rehearing to the judgment of this Court in this case dated December 26, 1957, and respectfully moves this Court for a rehearing in said case upon the following grounds:

1.

In its judgment this Court ruled that the Specifications of Error of appellant based upon his timely written requests to charge which the Trial Court did not give in charge are without merit because "defendant merely restated his request, but did not even attempt to give the *grounds* of his complaint that the court below had failed to give the instructions that he had requested"; and, consequently appellant failed "to comply with Rule 30 of the Federal Rules of Criminal Procedure . . ."

On page 4 of this Court's judgment in this case there is set forth *in part* what took place between the Trial Court and defendant with respect to defendant's exceptions to the Trial Court's failure to charge his submitted written requests. Following is the entire context of these exceptions and the Trial Court's response:

"By the Court:

I will hear first from the defendant.

Mr. Miller:

"Your Honor, the only exception and request that we would have would be that our written requests that have already been submitted, which Your Honor has considered, I feel confident that it would be needless for me to pick them up and read those that the Court has not charged. That's not necessary is it, sir?

By the Court:

"I don't think so. You can just except to all those which I did not give.

Mr. Miller:

"This is my intention, sir.

By the Court:

"I believe that would be sufficient."

Record, pp. 542, 543

It is respectfully submitted that this Court in rendering its judgment in this case overlooked and failed to apply the above ruling of the Trial Court to the effect that it was not necessary for defendant to go further and state "the grounds for his complaint" pertaining to the court's failure to charge such written requests.

On page 4 of this Court's judgment in this case there is this statement:

"It appears that at the close of the testimony the defendant presented a number of written instructions, and asked the court to give them to the jury."

It is not believed that the record discloses when the requests were submitted to the Trial Court, but regardless of when submitted, it is respectfully contended that in the absence of a contrary showing (and none is in the record), it is to be presumed that the Trial Court read such requests, and from them alone, the defendant's opening statement to the jury and argument to the jury, the court fully understood and comprehended the defendant's position and contentions with respect to the involved requests to charge as applied to the facts and law of the case.

As shown in our accompanying brief in support of this motion, it is respectfully contended that so much of Rule 30 of the Federal Rules of Criminal Procedure as requires that before error may be assigned on omissions from the trial court's charge there must be objections thereto, and the grounds of objection must be distinctly stated, is for the benefit of the trial court in its charge to the jury; and, in view of the ruling of the Trial Court that no further exception need be made to its failure to charge the written requests, but that the defendant could "just except to all those which I did not give," no further objection of statement of grounds of objection would be required.

In fact, any further statement of objections or grounds of complaint would have been contrary and repugnant to the announced ruling of the Trial Court that nothing more be said to "except to all those (meaning written requests to charge) which I did not give."

It is, therefore, respectfully submitted that so much of this Court's judgment is erroneous as holds without merit, and therefore not reversible error, nor basis for consideration

of reversible error, appellant's Specifications of Error numbered 4 (a), 4 (b), 4 (c), 4 (d), 4 (e) (appellant's brief, pages 11 and 12, pertaining to testimony of an accomplice), 4 (f) (appellant's brief, page 13, concerning a special defense and contention of defendant as to the arrangement and agreement defendant had with his co-inflictee to acquire property), 4 (g) (appellant's brief, page 14, pertaining to criminal intent and the amount of evidence and conviction required by the jury before a verdict of guilty would be authorized), and 4 (h) (appellant's brief, pages 15 and 16, pertaining to a special defense and contention of defendant as to his acquiring property under circumstances possibly amounting to a conversion with no criminal intent.)

This Court, with respect to Specification of Error 4 (h), as we read this Court's decision, states on page 9 that "appellant now for the first time" makes a point on the failure of the court to charge this request.

It is respectfully submitted that the record discloses that this point was made at the trial when it was submitted as a written request, and exceptions were taken on the failure of the court to so charge, as above set out, and this point was submitted upon the motion for new trial to the Trial Court.

2.

As this Court stated, no exceptions were taken at the trial concerning Specification of Error 1 (the Trial Court's charge on good character of defendant, appellant's brief, page 7) and Specification of Error 3 (court's charge analogizing case to one of armed bank robbery, appellant's brief, page 10). It is respectfully submitted that both these charges, individually and collectively, were "errors or defects affecting substantial rights" (Rule 52 (b), Federal Rules of Criminal Procedure) of the defendant, and should be so considered by this Court, although counsel for defendant was not sufficiently astute to take exception at the trial.

It is respectfully contended that the judgment of this Court holding that such errors were not within the intent and purview of Rule 52 (b), Federal Rules of Criminal Procedure and applicable court decisions applying such rule is erroneous.

WHEREFORE, a rehearing in this case is respectfully requested.

WALLACE MILLER, JR.,
Attorney for Appellant

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GEORGIA, Bibb County

I, Wallace Miller, Jr., certify that I am counsel for the appellant and that the foregoing motion for rehearing is presented in good faith and not for delay, and that I verily believe said motion for rehearing should be granted.

This _____ day of January, 1958.

WALLACE MILLER, JR.,
Attorney for Appellant

I certify I have served appellee with a copy of the foregoing motion for a rehearing by delivering a copy of the same to Hon. Frank O. Evans, United States Attorney in and for the United States District Court for the Middle District of Georgia, Macon Division.

This _____ day of January, 1958.

WALLACE MILLER, JR.,
Attorney for Appellant